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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. VICTOR R. JARAMILLO, Defendant and Appellant.	A124925 (San Francisco City & County Super. Ct. No. 198660)

I.

INTRODUCTION

Appellant Victor R. Jaramillo appeals from the revocation of his probation and resulting three-year state prison sentence. He contends that his rights under *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*) and to due process were violated in connection with the probation revocation hearing. He also contends that if we affirm the judgment, he is entitled to a recalculation of his local custody credits, pursuant to newly enacted amendments to Penal Code section 4019.[1] We conclude he is entitled to the benefit of the newly enacted amendments to section 4019, and remand the case to the trial court to recalculate appellant's custody credits. In all other respects, we affirm.

[1] All undesignated statutory references are to the Penal Code.

II.

PROCEDURAL HISTORY

A two-count information was filed by the San Francisco District Attorney's Office on May 15, 2006, charging appellant with transportation of cocaine (count one) and sale of marijuana (count two). (Health & Saf. Code, §§ 11352, subd. (a), 11360, subd. (a).) After pleading not guilty to the charges, appellant entered into a negotiated plea whereby, in return for pleading guilty to count two, he was placed on probation for three years, with conditions. As material here, conditions of probation included that appellant obey all laws, and that he "stay away from the area bounded by Van Ness, Bush, Powell, and Market St." (the stay-away condition).

On November 28, 2006, a motion to revoke probation was filed. Appellant admitted the violation in that he sold a controlled substance. He was ordered continued on probation, and he served an additional term in county jail of 120 days, with 17 days credit.

Another motion to revoke probation was filed August 7, 2007. Appellant subsequently admitted the probation violation. Probation was ordered reinstated under the same terms as previously imposed, plus appellant was ordered to serve one year in the county jail. The court's order allowed appellant to serve his additional time in a residential drug treatment program.

On April 25, 2008, another motion to revoke probation was filed. This motion was based on a report that appellant was in violation of the stay-away condition, and was in possession of alcohol and a pipe commonly used to smoke cocaine base. Before a hearing was held on this motion, an additional ground was added as a basis upon which probation revocation was sought. This additional ground was that on April 6, 2008, appellant went to the home of his estranged wife Coral Talavera and her daughter S.B., and assaulted Ms. Talavera (Talavera) while there (the April 6 incident).

The hearing on the motion to revoke probation was heard on January 26, 2009. Appellant filed a motion to exclude any proffered hearsay statements of Talavera and S.B. under *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*). This motion was

denied at the commencement of the hearing.[2] Thereafter, the prosecutor, Mr. Bringardner (Bringardner), requested the court declare Talavera and S.B. to be "unavailable" because they had been subpoenaed for the hearing, and were not present. The motion was opposed by appellant, but was ultimately granted.

The hearing proceeded, and the court allowed Michael Brumfield, the Contra Costa County deputy sheriff who investigated the April 6 incident at Talavera's home, to testify about what Talavera and S.B. told him. On this occasion, April 6, 2008, Deputy Brumfield had his fifth contact with Talavera. She was distraught. She told the officer that appellant had been engaged in an argument with S.B., and Talavera attempted to intervene. Appellant then grabbed S.B. and shook her. Talavera told the officer that during the argument, appellant pushed her onto a bed, then picked up a knife, held it up to her neck and threatened her. The threat was something like "[i]f I go down, you go down with me." Talavera believed that appellant would kill her.

The officer found appellant hiding in an alcove underneath the house, and arrested him. Appellant was then searched and a sheetrock knife was found on his person. Deputy Brumfield interviewed S.B., and she confirmed what Talavera had told him.

A San Francisco police officer, Jason Darden, testified about finding appellant in the area of Jones and O'Farrell streets on April 24, 2008, and determining that appellant was within an area he was to "stay away" from as a condition of probation. The court also took judicial notice of the earlier probation order which included the stay-away condition. Also testifying at the hearing was an investigator from the San Francisco Public Defender's Office, Nigel Phillips, and appellant.

At the conclusion of the hearing, the court found by a preponderance of the evidence that appellant had violated the terms of his probation both by violating the stay-away condition and by assaulting Talavera. The court found no violation of a restraining

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[2] Appellant does not contend it was error for the court to deny his motion. It has been held that *Crawford* does not apply to probation revocation proceedings. (*People v. Johnson* (2004) 121 Cal.App.4th 1409, 1411, criticized on other grounds in *People v. Geier* (2007) 41 Cal.4th 555, 616.)

order. Appellant's probation was ordered revoked, and the matter was continued until February 17, 2009, for sentencing, and later continued to February 25, 2009.[3]

On February 23, 2009, appellant made a motion to continue sentencing to allow counsel to file a motion to dismiss or for a new hearing "based upon discovery violations." In counsel's supporting declaration, she stated on information and belief that the evening before the probation revocation hearing, Talavera informed Bringardner that she was ill and could not attend the hearing, and would like to testify and would be available on a later date. She also states that Talavera "recanted" what she reportedly said in the police report about the alleged assault. The motion to continue was granted, and a motion for a new hearing due to discovery violation was filed on February 25, 2009.

A hearing on the motion took place of April 27, 2009. The only two witnesses who testified were Talavera and Bringardner. At the conclusion of the testimony the court denied the motion, concluding that Talavera was not a credible witness, and therefore the court did not believe that Talavera gave any exculpatory evidence to Bringardner, which he was required to disclose to appellant. Appellant was then sentenced to the midterm of three years in state prison, with local credits awarded of 712 days. This appeal followed.

III.

DISCUSSION

A. Showing Made At Hearing on Motion

At the hearing on the motion, appellant's counsel called Talavera as a witness. She testified that Bringardner called her on Sunday afternoon, the day before the probation revocation hearing. She advised Bringardner that she was suffering from a very serious case of systemic lupus and had not been out of the house since being

[3] Appellant does not contest that the court's findings were supported by substantial evidence.

discharged from the hospital the previous week. Because of that, she did not think she would be able to attend the hearing.

Bringardner reminded Talavera that he had subpoenaed both Talavera and her daughter S.B. to attend the hearing. Talavera responded that she did not know her daughter had also been served through her; she thought that the second paper she received when she got her subpoena was simply a copy of her own subpoena. Because she might not be able to attend the hearing, she was not going to put her 15-year-old daughter on BART (Bay Area Rapid Transit) by herself and send her into San Francisco.

Bringardner then said she should try to attend because he was concerned for her safety based on what she told the police, as detailed in their report. He read her portions of the report, including that on April 6, 2008, appellant had been to her home and put a knife to her throat as he threatened her. She responded the report was wrong and that was not what happened at all. Talavera then told Bringardner that appellant never put a knife to her throat. He did grab her daughter, but only to prevent her from "smacking" him, as she was upset. She also told Bringardner that appellant "never laid a hand on either of us. And he is better with the children than I am."

Due to her health condition, Talavera did not know how she would be day to day. For that reason, she told Bringardner she would call him the first thing the following morning, and tell him if she was able to make the hearing. He said "Okay," and gave her his telephone number. She did try to call him the next morning when she found herself too ill to travel. She left a message to that effect on his voicemail.

On cross-examination, Talavera admitted that she had 31 prior felony convictions for federal mail fraud in 2002. She admitted that some facts in the police report were accurate, including that appellant had come to her home and that he had a knife. She and appellant had a seven-year-old son together, and she admitted that when appellant is released, they intend to maintain a parenting relationship, but not one "as a couple." As to appellant's release, she agreed she did not want him to go to prison as he had a drug problem, and prison would not provide him the treatment he needed.

On redirect, Talavera explained that appellant had a knife on his person when he visited her on April 6, 2008, for his own protection against a large-sized neighbor who was drunk and threatening him. The knife was a sheetrock knife and one of the tools appellant carried with him for work.

Bringardner then testified that he spoke to Talavera the day before the hearing by telephone, which was a Sunday. He confirmed that Talavera said she had lupus and was very sick. However, she said she would make every effort to get to court the next day with her daughter on BART. She did not ask for any help with transportation. Bringardner asked Talavera to call him the next morning to tell him how she was feeling or if she was too sick to come to court. She promised to call him "either way" the next morning. Bringardner did not receive a call, nor did he get a voicemail message from her. He tried to call her at the number she had given him, but all he heard was a very odd message; something like "enter your account number to leave a message."

During their conversation on Sunday, they did not discuss the April 6 incident. Bringardner was not really concerned about what Talavera would say at that point because either she would confirm what was in the police report, or he would use it to impeach her if she changed her story. It was his impression before their call that she was probably a hostile witness, and he just wanted to get her into court. He also knew about her prior felony convictions.

When she did not appear at the hearing, he did not know at that point if she was too sick to come to court, or if she was on her way. He did not inform the court or counsel about his conversation the previous day with Talavera because he did not think it was relevant. Because he did not know why she was not in court the next morning and because the case had been continued so many times, he decided to go forward with it. Either the court would declare her unavailable, or the motion would be withdrawn at that point. Bringardner denied on cross-examination that he had any personal interest in the matter, and either Talavera was going to appear, he would proceed under Evidence Code section 1370, or he would withdraw the motion.

At the conclusion of the testimony, appellant's counsel argued that the failure to report what he had learned during his telephone call with Talavera the previous day constituted *Brady* error.

After hearing from both sides, the court denied the motion for a new hearing on the probation revocation as follows:

"THE COURT: Well, the motion for a new hearing is denied.

"I do not—well, I find that Ms. Talavera[] is not a credible witness.

"In addition to all the points made by [the prosecution], particularly important to me, number one, she apparently waited an entire year. This motion to revoke was filed last April, 2008. She apparently waited an entire year to tell someone that this didn't happen. Number two, the inconsistent statement made at the time of the incident to the sheriff deputy does not bode well for her credibility. And number three, her felony convictions.

"There is no dispute that there was a conversation between her and Mr. Bringardner. The issue is, did she give him any exculpatory evidence that should be turned over to the defense.

"Since I don't find her to be a credible witness, I do not think the conversation, as she related it, occurred.

"So the motion is denied."

B. *Brady* Standard

As to appellant's claim of *Brady* error, appellant acknowledges that the trial court applied the *Brady* legal standard correctly at the hearing on appellant's motion.

In *Brady*, "the United States Supreme Court held that a defendant's right to due process is violated when 'favorable' evidence that has been 'suppressed' by the prosecution is 'material' to the issue of guilt or punishment. The violation occurs even when the prosecution has not acted in bad faith and the favorable evidence has not been requested. [Citations.]" (*In re Pratt* (1999) 69 Cal.App.4th 1294, 1312.)

"The defendant must establish that the undisclosed information was favorable to the defense and that there is a reasonable probability that, had the evidence been

disclosed to the defense, the result of the trial would have been different. [Citation.] Such a reasonable probability exists where the undisclosed evidence 'could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.' [Citations.] Impeachment evidence, as well as exculpatory evidence, falls within the scope of *Brady*. [Citation.]" (*Eulloqui v. Superior Court* (2010) 181 Cal.App.4th 1055, 1063.)

Put in slightly different terms, evidence is material under the *Brady* standard " ' "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." (*United States v. Bagley* (1985) 473 U.S. 667, 682 . . .' (*City of Los Angeles v. Superior Court* (2002) 29 Cal.4th 1, 7-8.)" (*People v. Cook* (2006) 39 Cal.4th 566, 587.)

"Conclusions of law or of mixed questions of law and fact, such as the elements of a *Brady* claim [citation], are subject to independent review. [Citation.] Because the referee can observe the demeanor of the witnesses and their manner of testifying, findings of fact, though not binding, are entitled to great weight when supported by substantial evidence. [Citation.]" (*People v. Salazar* (2005) 35 Cal.4th 1031, 1042.)

C. Analysis of *Brady* Issue

The most obvious obstacle to appellant's claim of *Brady* error is the finding by the trial judge that Talavera was not a credible witness, and therefore her testimony about "recanting" to the prosecutor over the telephone was not believable. Of course, if the conversation did not take place, as concluded by the trial judge in light of the conflicting testimony on this point, there was no "undisclosed evidence."

The trial court offered three reasons for its conclusion that Talavera was not believable. We agree that each and all of them constitute substantial evidence for the conclusion reached, and requires affirmance on that basis. First, the court drew an inference that Talavera was not now telling the truth because it is not likely she would wait a year to come forward and dispute what was in the police report. This was a reasonable inference for the trial court to draw. Talavera testified that she did not want appellant to have his probation revoked and for him to go to prison. Given that, if the

police report upon which the motion to revoke probation was partly based was seriously erroneous, one would expect that she would have raised that issue sometime during the year her husband was in jail awaiting a hearing.

Another justification warranting the trial court to disbelieve Talavera's testimony, was her admission that she had suffered 31 felony prior convictions for crimes clearly implicating moral turpitude (mail fraud). And, the inconsistency between her statement to the police and her testimony is a third factor reasonably relied on by the trial court in finding *Brady* inapplicable.

Finally, we are impressed by our Supreme Court's observation in *People v. Salazar* that, in reviewing alleged *Brady* error, "[b]ecause the referee can observe the demeanor of the witnesses and their manner of testifying, findings of fact, though not binding, are entitled to great weight when supported by substantial evidence. [Citation.]" (*People v. Salazar*, *supra*, 35 Cal.4th at p. 1042.) This is such a case where the trial court's conclusion should be accorded great weight because she heard the testimony recanting the prior statement from the witness herself. Therefore, we affirm the ruling based on the absence of any undisclosed exculpatory evidence withheld by the prosecution.

We affirm for two additional reasons. As already noted, to prove *Brady* error, the defendant must show that there was a reasonable probability of a different result had the exculpatory evidence been disclosed to the defense. (*Eulloqui v. Superior Court*, *supra*, 181 Cal.App.4th at p. 1063.) Here, we conclude that there was no such reasonable probability. Appellant argues that if the information Talavera imparted to the prosecutor was disclosed at the time of the hearing, appellant would have successfully blocked the prosecution's motion to have her declared "unavailable" for purposes of Evidence Code section 1370.[4] This would have forced the prosecution or allowed the defense to move

[4] That section states in material part: "(a) Evidence of a statement by a declarant is not made inadmissible by the hearsay rule if all of the following conditions are met: . . . [¶] (2) The declarant is unavailable as a witness pursuant to Section 240."

for a continuance, and Talavera would then have testified about the inaccuracies in the police report at a later hearing.

If indeed she had exculpatory evidence to give, Talavera would then testify to the same alleged inaccuracies in the police report that she related at the hearing on appellant's motion for a new hearing. But this testimony would have lead to the same finding by the trial court that she was not believable. Thus, even if a finding of unavailability had not been made, and the matter had proceeded to a new hearing, the trial court would still have revoked appellant's probation. Under these circumstances, appellant has failed in his burden to show a different result was reasonably probable had the disclosure been made.

Lastly, the trial court revoked probation on *two* grounds: the assault on Talavera, and the violation of the stay-away condition. Appellant has not convinced us that had probation not been revoked based on the alleged assault on Talavera, it also would not have been revoked based on the unchallenged finding that he violated the stay-away condition.

For any and all of these reasons, we conclude that the trial court did not err in rejecting appellant's claim of *Brady* and due process violations, and we affirm the court's ruling denying the motion for a new probation revocation hearing, and resulting judgment.

D. Appellant's Entitlement to Increased Custody Credits Under Section 4019

Appellant also contends he should receive the benefit of the recent amendments to section 4019, increasing the amount of work and conduct credits available for time spent in custody before sentencing. Defendant was sentenced on April 27, 2009, before the amendments went into effect on January 25, 2010.

Before that date, subdivisions (b) and (c) of section 4019 provided that "for each *six-day period* in which a prisoner is confined in or committed to" a local facility, one day was deducted from the period of confinement for performing assigned labor and one day was deducted from the period of confinement for satisfactorily complying with the rules and regulations of the facility. (Italics added.) (Stats. 1982, ch. 1234, § 7,

pp. 4553-4554.) In addition, previously, subdivision (f) of section 4019 provided that "if all days are earned under this section, a term of *six days* will be deemed to have been served for every four days spent in actual custody." (Italics added.) (Stats. 1982, ch. 1234, § 7, p. 4554.) The Legislature passed the amendments, which went into effect on January 25 of this year, " . . . to provide for the accrual of presentence credits at twice the previous rate for all prisoners except those 'required to register as a sex offender,' 'committed for a serious felony, as defined in Section 1192.7,' or who have a prior conviction for a serious or violent felony. (§ 4019, subd. (b)(2); see also *id*., subd. (c)(2); Stats. 2009-2010, 3d Ex.Sess., ch. 28, § 50.)" (*People v. Brown* (2010) 182 Cal.App.4th 1354, 1360, review granted June 9, 2010, S181963.) Thus, newly enacted subdivisions (b)(1) and (c)(1) of section 4019 provide that one day of work credit and one day of conduct credit may be deducted for each *four-day period* of confinement or commitment. According to revised subdivision (f), "if all days are earned under this section, a term of *four days* will be deemed to have been served for every *two days* spent in actual custody . . . ." (§ 4019, subd. (f), italics added; see also Stats. 2009-2010, 3d Ex.Sess., ch. 28, § 50.)

There is a split in the appellate districts of this state as to whether these amendments are retroactive, and apply to sentences imposed before the amendments became effective, but where the underlying convictions are not yet final on appeal. So far, our Supreme Court has granted review on cases going both ways on the issue.

In re Estrada (1965) 63 Cal.2d 740 (*Estrada*), established the general rule that an enactment that reduces punishment for a crime operates retroactively, so that the lighter punishment is imposed. (*People v. Rodriguez* (2010) 183 Cal.App.4th 1, 6-8.) In *Estrada*, the court stated: "When the Legislature amends a statute so as to lessen the punishment it has obviously expressly determined that its former penalty was too severe and that a lighter punishment is proper as punishment for the commission of the prohibited act. It is an inevitable inference that the Legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should

apply to every case to which it constitutionally could apply." (*Estrada*, *supra*, 63 Cal.2d at p. 745.)

Similarly, 12 years after *Estrada* was decided, the court in *People v. Hunter* (1977) 68 Cal.App.3d 389, 392-393 (*Hunter*), concluded that an amendment to section 2900.5 allowing for an award of presentence custody credits lessened punishment within the meaning of *Estrada*, and *People v. Doganiere* (1978) 86 Cal.App.3d 237, 239-240. Therefore, the *Hunter* court also applied *Estrada* to an amendment involving conduct credits.

We agree with appellant that the general principle established in *Estrada* applies to the recent amendments to section 4019. The effect of the amendments is to reduce the overall time of imprisonment, and, thus, the punishment, for those less serious offenders who have demonstrated good behavior while in custody. This result is consistent with other provisions of recently enacted legislation intended to provide additional means of reducing prison population and with the overall intent of the Legislature to address the state's fiscal emergency. (See Stats. 2009-2010, 3d Ex.Sess., ch. 28, § 62.) Thus, like the law at issue in *Estrada*, the Legislature's intent in passing the amendments to section 4019 was to lessen the punishment for certain crimes, and to make these amendments part of the legislative package intended to ease budgetary concerns by, in part, reducing the number of prisoners serving time.

In re Stinnette (1979) 94 Cal.App.3d 800, 804-806, is not controlling. In that case this division concluded that an amendment to section 2931 under the Determinate Sentencing Act allowing prisoners to earn conduct credits, but expressly limiting the amendment to time served after the effective date, did not violate equal protection. The *Stinnette* court did not consider whether, in the absence of an express limitation, it must be presumed that the Legislature intended retroactive application.

We find the reasoning of *Estrada* and *Hunter* applicable here, and conclude that the amendments apply retroactively.

IV.

DISPOSITION

The matter is remanded to the trial court with directions to recalculate the defendant's credits under amended section 4019. The trial court shall then prepare an amended abstract of judgment, and forward a copy to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

_____
RUVOLO, P. J.

We concur:

_____
REARDON, J.

_____
RIVERA, J.